Tan Chong Keat Sdn Bhd v Pintar Pintas Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P–02–721 OF 2003
DENIS ONG, MOHD GHAZALI AND ARIFIN JAKA JJCA
16 MAY 2005

Civil Procedure — Preservation of property — Payment of proceeds of sale into joint account of solicitors — Whether exists serious questions to be tried — Whether real risk that party may dissipate proceeds of sale — Balance of convenience — Maintenance of status quo pending trial — Rules of the High Court 1980 O 29 r 2

The appellant, a locally incorporated company, was at all material times the registered proprietor of a piece of land ('the said property'). The said property was at all material times charged to Public Bank Bhd. Vide a power of attorney ('the said power of attorney'), the appellant appointed one Tan Chong Kean ('TCK') to act in conduct and manage all of the appellant's affairs in regard to the said property. By a sale and purchase agreement, TCK as attorney for and on behalf of the appellant sold the said property to the respondent ('the said agreement'). The appellant instituted these proceedings against TCK and the respondent on the premise that the said power of attorney was null and void or in the alternative, that the exercise of the same by TCK was wrongful and of no effect whatsoever and that it would follow that the said agreement was also null and void and of no effect whatsoever. The respondent filed a counter-claim against the appellant. In the meantime, Public Bank Bhd as chargee of the said property instituted foreclosure proceedings against the appellant and obtained an order for sale. The said property was successfully auctioned off. The respondent filed an application under O 29 r 2 of the Rules of the High Court 1980 ('RHC 1980') for, *inter alia*, an order that the balance of proceeds of sale of the said property by auction, be paid into a joint bank account of solicitors for the appellant and respondent pending the disposal of the proceedings. The application was allowed by the High Court and hence, this appeal.

Held, dismissing the appeal:

(1) There was nothing erroneous with the decision of the High Court in granting the order prayed for by the respondent in this application. Order 29 r 2 of the RHC 1980 provided for a pre-trial remedy available to a party before the full trial of an action, viz, the preservation of the subject-matter of the dispute. In these proceedings, the balance of the proceeds of sale of the said property was the subject-matter. The said property had been sold to a third party by way of auction after the foreclosure proceedings. Public Bank Bhd would be legally bound to pay the balance of the proceeds of sale to the appellant, it being the registered owner of the said property at the material time (see para 27).

(2) The principles enunciated in *Lian Keow Sdn Bhd v Overseas Credit Finance Bhd* [1982] 2 MLJ 162 would equally apply to applications for the preservation

of property which is the subject-matter of the cause or matter made pursuant to O 29 r 2 of the RHC 1980. Just as an application for injunction, an application for the preservation of property is a pre-trial remedy (see paras 37 and 38).

(3) There existed several serious questions to be tried and the High Court was correct in making the order that it did. Further, the conduct of the appellant seemed to support the respondent's stand that there was a real risk that the appellant may dissipate or remove the balance of the proceeds of sale of the said property due from Public Bank Bhd. Under the circumstances, the balance of convenience clearly lied in favour of granting the order for the preservation of the balance of the proceeds of sale of the said property, viz, by paying the monies into a joint bank account of solicitors for the appellant and respondent pending the disposal of the proceedings. The court cannot see how the appellant can be prejudiced by such an order. No injustice would be suffered by the appellant by the granting of the order (see para 47).

[**Bahasa Malaysia summary**

Perayu, sebuah syarikat yang diperbadankan tempatan adalah pada semua masa material pemilik berdaftar sebuah tanah ('harta tersebut'). Harta tersebut adalah pada semua masa material caj kepada Public Bank Bhd. Melalui satu surat wakil kuasa ('surat wakil kuasa tersebut') perayu telah melantik satu Tan Chong Kean ('TCK') untuk bertindak dan menguruskan segala hal-hal perayu yang berkaitan dengan harta tersebut. Melalui satu perjanjian jual beli, TCK sebagi wakil untuk dan bagi pihak perayu telah menjual harta tersebut kepada responden ('perjanjian tersebut'). Perayu memulakan prosiding-prosiding ini terhadap TCK dan responden atas sebab bahawa wakil surat kuasa itu tidak sah dan terbatal dan tidak mempunyai apa-apa kesan. Responden memfailkan satu tuntutan balas terhadap perayu. Pada masa yang sama Public Bank Bhd sebagai pemegang gadaian harta tersebut telah memulakan satu prosiding halang tebus terhadap perayu dan telah mendapatkan satu perintah jual. Harta tersebut berjaya dilelongkan. Responden memfailkan satu permohonan di bawah A 29 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT 1980') untuk *inter alia*, satu perintah bahawa baki daripada keuntungan jualan harta tersebut melalui lelong dibayar ke dalam satu akaun bank bersama di antara peguam untuk perayu dan responden sementara menunggu penyelesaian prosiding.

Diputuskan, menolak rayuan itu:

(1) Tidak ada apa yang salah dengan keputusan Mahkamah Tinggi dalam membenarkan perintah yang dipohon oleh responden dalam permohonan ini. Aturan 29 k 2 KMT 1980 memperuntukkan satu remedi pra-pembicaraan yang sedia ada kepada suatu pihak sebelum perbicaraan lanjut satu guaman, viz, pemeliharaan perkara subjek pertikaian itu. Dalam prosiding ini, baki daripada keuntungan jualan harta tersebut merupakan perkara subjek.

Harta tersebut telah dijual kepada pihak ketiga melalui lelong selepas prosing halang tebus. Public Bank Bhd dikehendaki di sisi undang-undang untuk membayar baki daripada jualan itu kepada perayu, ia sebagai pemilik berdaftar harta tersebut pada masa material (lihat perenggan 27).

(2) Prinsip-prinsip dalam *Lian Keow Sdn Bhd v Overseas Credit Finance Bhd* [1982] 2 MLJ 162 akan dipakai sama sekali dalam permohonan untuk pemeliharaan harta yang merupakan perkara subjek kepada sebab atau perkara menurut A 29 k 2 KMT 1980. Seperti satu permohonan untuk injunksi, satu permohonan untuk pemeliharaan harta adalah satu remedi pra-pembicaraan (lihat perenggan 37 dan 38).

(3) Terdapat beberapa soalan serius untuk dibicarakan dan Mahkamah Tinggi betul dalam memutuskan perintah itu. Lagipun, tingkah laku perayu menyokong pendirian responden bahawa terdapat risiko yang sebenar yang perayu mungkin melesapkan atau memindahkan baki daripada keuntungan jualan harta tersebut daripada Public Bank Bhd. Di bawah keadaan ini, imbangan kemudahan jelas memihak kepada memberikan perintah untuk pemeliharaan baki daripada jualan harta tersebut, viz, dengan membayar jumlah itu kepada satu akaun bersama peguam perayu dan responden sementara menunggu penyelesaian prosiding. Mahkamah mendapati perayu tidak akan diprejudis dengan perintah ini. Tiada apa-apa ketidakadilan pada perayu dengan memutuskan perintah ini (lihat perenggan 47).]

Notes

For cases on preservation of property, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5009–5010.

Cases referred to

Caltex Oil Malaysia Ltd v Tee Than Song [1969] 2 MLJ 184 (refd)
Lian Keow Sdn Bhd v Overseas Credit Finance Bhd [1982] 2 MLJ 162 (refd)

Legislation referred to

Debtor's Act 1957
Powers of Attorney Act 1949 ss 3, 4, 6, 7
Rules of the High Court 1980 O 29 r 2, 3

Appeal from: Civil Suit No 22–180 of 2002 (High Court, Pulau Pinang)

Mahinder Singh Dulku (Bernard Kok with him) (Lim Kean Siew & Co) for the appellant.
Ghazi Ishak (Foong Kai Choong with him) (Ban Eng, Anual & Foong) for the respondent.

Mohd Ghazali JCA (delivering judgment of the court):

BACKGROUND

[1] The appellant, a locally incorporated company (the plaintiff in the court below) was at all material times the registered proprietor of a piece of land

comprised in Geran No 19943 known as Lot No 698, Seksyen 2, Bandar Georgetown, Daerah Timur Laut, Penang together with premises known as No 11, Jalan Lim Mah Chye, Penang erected thereon ('the said property'). The said property was at all material times charged to Public Bank Bhd.

[2] Vide a power of attorney dated 3 June 1996 ('the said power of attorney'), the appellant appointed one Tan Chong Kean (the first defendant in the court below and hereafter referred to as 'TCK') to 'act in conduct and manage all my affairs in, the State of Penang, Malaysia provided always that the power herein conferred shall be limited only to' the said property. Clause 13 of the said power of attorney, *inter alia*, reads:

> To sell either by public auction or private or exchange any part of my freehold or leasehold messuages lands ... for such consideration ... as he may think fit ... and also to deal with my real or personal property or any part thereof as he may think fit for the purpose of paying off reducing consolidating or making substitution for any existing or future mortgage charge or pledge thereon or thereof or any part thereof ... and in connection with any such sale or mortgage pledge or charge to employ and remunerate any valuer.

[3] Clause 24 of the same reads:

> For all or any of the purposes of these presents to enter into and sign seal execute and perfect and as my act and deed to deliver any conveyances deed or mortgage contract instrument deed surrender or assurance whatsoever….

[4] A proviso appearing in the last paragraph of the said power of attorney reads:

> … PROVIDED ALWAYS that I/We shall not revoke the Power of Attorney herein granted until such time as the loan sum of Ringgit Malaysia Two Million Five Hundred Thousand (RM2,500,000) granted by Public Bank Bhd ... to Mega Splendour Sdn Bhd shall have been fully settled.

[5] By a sale and purchase agreement dated 31 December 2001, TCK as attorney for and on behalf of the appellant sold the said property to the respondent (the second defendant in the court below) for RM1.72 million ('the said agreement').

[6] On 9 April 2002, the appellant instituted these proceedings against TCK and the respondent on the premise that the said power of attorney is null and void or in the alternative, that the exercise of the same by TCK was wrongful and of no effect whatsoever and that it would follow that the said agreement is also null and void and of no effect whatsoever. The reliefs sought for are, *inter alia*, as follows:

(a) a declaration that the said power of attorney is null and void;

(b) a declaration that the said agreement is null and void;

(c) an order that the said agreement be rescinded; and

(d) an interim injunction restraining TCK and the respondent from completing the sale and purchase of the said property until the trial of the action.

[7] The respondent filed a counter-claim against the appellant and sought for, *inter alia,* the following reliefs:

(a) a declaration that the said power of attorney is valid and binding upon the appellant and TCK;

(b) a declaration that the revocation of the said power of attorney on 30 January 2002 is null and void and of no effect;

(c) an order for specific performance of the said agreement and all necessary and consequential directions; and

(d) damages in lieu of specific performance against the appellant and TCK jointly and severally.

[8] On 10 April 2002, the appellant filed an application for an interlocutory injunction to restrain TCK and the respondent from completing the sale of the said property and from presenting the transfer of the same in favour of the respondent. The application was heard on 5 September 2002 and was dismissed. The appellant has appealed against that decision and the matter, which has been registered as Civil Appeal No P–02–775 of 2002, is now pending before this court.

[9] In the meantime, Public Bank Bhd as chargee of the said property instituted foreclosure proceedings against the appellant under Penang High Court Originating Summons No 24–1304 of 2002 and obtained an order for sale of the same. The said property was successfully auctioned off on 12 March 2003 for the sum of RM3 million.

[10] On 23 June 2003, the respondent filed an application (encl 35 and hereafter referred to as 'this application'), viz, the subject of this appeal, under O 29 r 2 of the Rules of the High Court ('the rules') for, *inter alia*, an order that the sum of RM1,452,000 which is the balance of proceeds of sale of the said property by auction, be paid into a joint bank account of solicitors for the appellant and respondent pending the disposal of the proceedings. The application was allowed by the learned judge and hence, this appeal. Order 29 of the rules is entitled 'Interlocutory injunctions, interim preservation of property, etc' and r 2 reads:

> (1) On the application of any party to a cause or matter the court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.

[11] Order 29 r 3 reads:

> (3) Where the right of any party to a specific fund is in dispute in a cause or matter, the court may, on the application of a party to the cause or matter, order the fund to be paid into court or otherwise secured.

[12] In his grounds of decision in relation to this application, the learned judge noted the following facts:

(i) that upon the signing of the said agreement, the respondent as purchaser paid a sum of RM172,000 being 10% of the purchase price to TCK and consequently lodged a caveat;

(ii) the respondent has successfully applied for a loan of RM1.1 million from Standard Chartered Bank to pay the balance purchase price;

(iii) subsequently, the appellant's solicitors intimated to the respondent's solicitors that the said agreement is null and void;

(iv) the respondent's solicitors replied that the respondent will be proceeding to complete the purchase as it has successfully obtained a loan from Standard Chartered Bank; and

(v) that it is the appellant's case, as per statement of claim, that 'soon after discovery of the execution of the said Sale and Purchase Agreement', it revoked the said power of attorney on or about 30 January 2002 and subsequently notified TCK and the respondent of the said revocation.

[13] The learned judge also noted that the respondent's application to transfer the said property to itself was rejected due to the existence of caveats lodged against the said property by two companies, namely, Ever Point Sdn Bhd and Aquatic Products Sdn Bhd and that these two companies had links with one Tan Chong Keat, a director and a majority shareholder of the appellant. The evidence showed that the said Tan Chong Keat held 484,517 shares whilst the remaining shareholder held only 17 shares. The learned judge was of the view that the lodgement of the caveats may not have been *bona fide* under the circumstances.

[14] In canvassing this application in the court below, learned counsel for the respondent pointed out that prior to the said agreement, the appellant created two third party charges over the said land in consideration for a loan obtained by Mega Splendour Sdn Bhd wherein TCK held 50% shares and the said Tan Chong Keat through his nominee, one Lee Kan Hong held the other 50% shares. Mega Splendour Sdn Bhd defaulted on the loan and subsequently Public Bank Berhad obtained an order for sale of the said property. The appellant did not oppose the application for the order for sale. The said property was later auctioned off for the sum of RM3 million. The successful bidder then applied to remove the respondent's caveat which was lodged after the execution of the said agreement. As such the respondent is unable to pursue the relief of specific performance and would only be able to pursue its claim for damages against the appellant. Public Bank Bhd will pay the balance of proceeds from the auction sale to the appellant. It is the contention of the respondent that it is entitled to damages in the sum of RM1.28 million which is the difference between the auction price of RM3 million and the sale price of RM1.72 million as per the said agreement inclusive of the 10% deposit it had paid upon execution of the same. It is the respondent's belief that if the balance of the proceeds of the auction is paid to the appellant, the monies will be utilised and the respondent will be left with no remedy.

[15] In opposing this application in the court below, learned counsel for the appellant argued that TCK sold the said property to the respondent at a very low price as compared to the price obtained at the auction. Further, the respondent did not pay the balance of the purchase price within the time-frame as per the said agreement and has not up to date paid the same. It was also the appellant's contention that the said power of attorney is invalid. The appellant denied having any link with Ever Point Sdn Bhd and Aquatic Product Sdn Bhd and pointed out that the caveats entered by these companies have been removed as it has promised to compensate any party which has been aggrieved.

[16] As discussed earlier, the learned judge granted the main relief prayed for in this application, namely, he ordered that the sum of RM1,452,000 which is the balance of proceeds of sale of the said property by auction be paid into a joint bank account of solicitors for the appellant and respondent pending the disposal of the proceedings. Against that decision, the appellant appealed to this court. We had, on 14 December 2004 dismissed the appeal with costs and made directions for an early trial of the suit.

[17] Before us, learned counsel for the appellant submitted that the learned judge erred in law and in fact in allowing this application. He argued that the learned judge, in allowing this application, failed to appreciate, infer alia, the following:

(i) that cl 5(d) of the said agreement comprehensively sets out the specific remedy available to the respondent in the event of any default on the part of the vendor and had the learned judge judicially considered the true meaning and effect of this clause, he would not have allowed this application; cl 5(d) reads:

> In the event that the adjudicated and stamped transfer of the said property together with the issue document of title thereof shall be rejected for registration by the registering authority for reasons attributable to the vendor or due to any defect in the title including but not limited to a power of attorney given by the vendor to the attorney is not perfected for any reason whatsoever, after the purchaser shall have paid the whole of the said purchase price in accordance with the terms herein then the vendor shall within fourteen (14) days of such rejection and/or within fourteen (14) days from the date of such notification by the purchaser or the purchaser's solicitors whichever is the earlier, refund to the purchaser or the purchaser's solicitors the whole purchase price failing which interest at the rate of 8% pa shall be calculated on daily rest and any cost incurred in claiming the refund of the purchase price shall be borne by the vendor. The transfer, issue document of title and or other related documents shall be held by the purchaser's solicitors until receipt of the whole purchase price. Upon receipt of the said purchase price, the purchaser shall forthwith at the purchaser's own costs and expenses withdraw the private caveat lodged by the purchaser (if any), and thereupon this agreement shall be at an end and become null and void.

(ii) that the respondent took no steps to tender payment of the redemption sum to Public Bank Bhd, the chargee of the said property in order to cause the discharge of the charge over the said property; had the respondent made

payment to Public Bank Bhd towards the discharge of the charge over the said property in furtherance of the said agreement, Public Bank Bhd would have no cause to exercise its right to foreclose on the said property;

(iii) that the respondent did not and does not have a good cause of action and/or a good arguable case against the appellant for specific performance of the said agreement and/or for damages for breach of contract as the appellant was and is not in breach of any of the terms and conditions of the said agreement;

(iv) that there was no evidence before the court to suggest that there was a real risk that the appellant would dissipate or remove its assets with the view to frustrate, obstruct and/or delay any judgment which may be made against it;

(v) that the order sought by the respondent is in essence an order in the nature of an attachment before judgment and in consequence, that the respondent is required to satisfy the provisions of the Debtor's Act 1957 so as to entitle the respondent to the order sought;

(vi) that the respondent's undertaking as to damages was, in any event, illusory as its issued capital is only 10 ordinary shares;

(vii) that O 29 r 2 of the rules apply only to the preservation, pending trial, of the subject matter of the litigation in specie; in the instant case, the subject matter of the litigation is the said property.

[18] In opposing the appeal, learned counsel for the respondent drew our attention to the judgment of the High Court in Civil Appeal No P–02–775 of 2002, referred to earlier, wherein the learned judge has set out the facts of the instant case in detail which, *inter alia*, are as follows:

(i) TCK and the said Tan Chong Keat agreed to incorporate Mega Splendour Sdn Bhd to purchase a piece of land wherein TCK held 50% shares and the said Tan Chong Keat, through his nominee, Lee Kah Hong held 50% shares;

(ii) TCK advanced RM2.34 million into Mega Splendour Sdn Bhd to settle the purchase price of the said piece of land whilst the said Tan Chong Keat and/or the appellant paid 10% of the purchase price;

(iii) the said Tan Chong Keat was financially embarrassed and was not able to pay for his remaining 40% shares held by his nominee in Mega Splendour Sdn Bhd and neither he nor the appellant were able to obtain any funding from any financial institution to settle his 40% shares in Mega Splendour Sdn Bhd; as such, the said Tan Chong Keat requested TKC to assist him to obtain a loan from Public Bank Berhad to enable him to pay for his remaining 40% shares held by his nominee in Mega Splendour Sdn Bhd;

(iv) Public Bank Bhd granted a fixed loan of RM1.5 million and an overdraft facility of RM1.0 million ('the said banking facilities') to

Mega Splendour Sdn Bhd as nominee borrower; the banking facilities were secured by a third party charge on the said property;

(v) the banking facilities were further guaranteed by TCK and the said Lee Kah Hong who are directors of Mega Splendour Sdn Bhd;

(vi) on 3 June 1996, the following documents were prepared:

(a) two third party charges over the said property in favour of Public Bank Bhd to secure the said banking facilities;

(b) a letter of guarantee executed by TCK and the said Lee Kah Hong; and

(c) the said power of attorney dated 3 June 1996 created by the appellant in favour of TCK authorising the latter to act on its behalf in respect of the said property until the banking facilities taken by Mega Splendour Sdn Bhd has been fully settled by the appellant.

[19] Learned counsel for the respondent submitted that the said Tan Chong Keat was the ultimate recipient of the said banking facilities. TCK himself had contended that the understanding between the appellant and his goodself was that the said banking facilities would be serviced and repaid by the appellant and in order to safeguard his position as a guarantor, the appellant would create a power of attorney to authorise him to act on its behalf in respect of the said property until the said banking facilities have been fully settled by the appellant. Counsel argued that the proviso appearing in the last paragraph of the said power of attorney 'bears out' its story, viz, that the appellant shall not revoke the said power of attorney until such time as the loan sum of RM2.5 million granted by Public Bank Bhd to Mega Splendour Sdn Bhd shall have been fully settled by the appellant. He then pointed out repayments of the said banking facilities were defaulted around May 2001. Public Bank Bhd subsequently commenced legal proceedings on 27 October 2001 in the Penang High Court (Civil Suit No 22–554 of 2001) against the appellant and Mega Splendour Sdn Bhd and also against TCK and the said Lee Kah Hong as guarantors. He contended that by defaulting in the repayment of the said banking facilities, the appellant had breached the understanding/agreement with TCK thus entitling the latter to exercise the said power of attorney to sell the said property in order to settle the said banking facilities and also to safeguard his position and interests as guarantor.

[20] Learned counsel for the respondent pointed out that in the appellant's reply and defence to the respondent's counterclaim, the appellant averred that Public Bank Bhd's action against its goodself was an abuse of the process of court and contended that they have not at anytime refused or neglected to pay any debts owed by them to Public Bank Bhd and that they were not in breach of the terms of the said power of attorney. Counsel submitted that this is a very 'curious' averment by the appellant in the light of the undisputed fact that the repayments of the said banking facilities were defaulted thus resulting

in Public Bank Bhd commencing legal proceedings against the appellant Mega Splendour Sdn Bhd and TCK. Counsel then highlighted the following:

(i) TCK exercised his authority as attorney for and on behalf of the appellant and sold the said property to the respondent for RM1.72 million as per the said agreement;

(ii) under the circumstances, the respondent would seem to be a *bona fide* purchaser for value without notice of the alleged facts and circumstances as found in the appellant's statement of claim;

(iii) the respondent was informed by TCK that he is the lawful attorney of the appellant vested with full authority to deal with the said property;

(iv) TCK and the respondent were represented by their own solicitors when they entered into the said agreement;

(v) TCK's solicitors, by letter dated 5 December 2001, approved the draft of the said agreement and confirmed that the said power of attorney has been duly registered at the Penang High Court;

(vi) the respondent duly exercised the fair copies of the said agreement and paid the 10% deposit of RM 172,000 to TCK;

(vii) the respondent duly lodged a private caveat on 4 January 2002 to protect its interest; there were no other caveats at that material time;

(viii) the respondent has obtained a loan from Standard Chartered Bank to finance the purchase of the said property;

(ix) subsequently, the respondent was informed by the appellant's solicitors that they considered the said agreement to be null and void and that the respondent should not make any further payments to the vendor;

(x) the appellant then filed this action against TCK and the respondent.

[21] Counsel submitted that the allegations in the appellant's statement of claim are primarily against TCK; as against the respondent, the appellant seems to be making bare allegations unsupported by any evidence. The appellant even claimed that the said power of attorney was given to TCK for 'comfort only' and is only exercisable under 'limited circumstances'. Whatever it is, the respondent is certainly not aware of this. Counsel argued it can be seen that the appellant, at the outset, evinced a clear intention of not wanting to be bound by the said agreement entered into by TCK on its behalf and it even purported to revoke the said power of attorney on 30 January 2002. As such the respondent had no choice but to counter-claim for specific performance of the said agreement against the appellant.

[22] Shortly after the appellant was unsuccessful in obtaining an interlocutory injunction to restrain TCK and the respondent from completing the sale of

the said property, the respondent discovered the existence of two private caveats lodged against the same by Ever Point Sdn Bhd and Aquatic Products Sdn Bhd, purportedly on 2 April 2002 which was well after the respondent's caveat, lodged on 4 January 2002 and thus preventing the respondent from completing the purchase even if the respondent wins at the trial. Counsel then pointed out the following:

(i) the first caveat was lodged by Ever Point (M) Sdn Bhd on 2 April 2002 based on a lease agreement purportedly made between the appellant and Ever Point Sdn Bhd on 5 December 2000; a member of the board of directors of Ever Point Sdn Bhd is Khaw Sian Suan who is the wife of the said Tan Chong Keat;

(ii) the second caveat was lodged by Aquatic Products Sdn Bhd on 2 April 2002 based on a sale and purchase agreement purportedly made between the appellant and Aquatic Products Sdn Bhd on 27 October 1999 for the sale and purchase of the said property for RM4.2 million; the main shareholder of Aquatic Products Sdn Bhd is the said Tan Chong Keat.

[23] Under the circumstances discussed above, counsel submitted that both caveats were lodged by persons connected with the appellant and were designed to frustrate the respondent's action for specific performance. On 30 October 2002 the respondent filed Originating Summons No 24–1689 of 2002 in the Penang High Court for the removal of the two caveats.

[24] Counsel then pointed out that when the appellant applied for an interlocutory injunction to restrain TCK and the respondent as discussed earlier, it failed to disclose that it had earlier dealt with the said property. Further, the said Tan Chong Keat, in his affidavits, never mentioned that the appellant had earlier sold the said property for RM4.2 million to Aquatic Products Sdn Bhd and that it received a sum of RM2.94 million pursuant to the said sale. In the meanwhile, the appellant allowed the secured creditor, viz, Public Bank Bhd to foreclose on the said property notwithstanding that it had full knowledge of the sale of the said property to the respondent and not to mention the prior sale and purchase agreement and the lease agreement it had allegedly entered into with Aquatic Products Sdn Bhd and Ever Point Sdn Bhd, respectively.

[25] Counsel submitted that the appellant did not oppose the foreclosure proceedings although it was represented by solicitors during the proceedings. The appellant intentionally did not settle the monies owing under the said facilities. In fact, the appellant in an affidavit sworn by the said Tan Chong Keat stated that it is not in financial difficulties but intentionally allowed the said property to be auctioned off as it can fetch a higher value than the selling price as per the said agreement. Counsel argued that this shows the appellant's complete disregard for the said agreement and its intention in order to deprive

the respondent of the contract. The appellant has used Public Bank Bhd's priority on the charge to defeat the respondent's interest in the said property. Further, the appellant has not taken steps to prosecute its claim after its application for the injunction was dismissed. They have not even applied for case management.

[26] Counsel submitted that all the above-said facts show that the conduct of the appellant is lacking in probity and honesty and is bordering on contempt of the legal process. The appellant seem to be intent on defeating the respondent's right of specific performance under the said agreement before the trial of the action. Counsel then informed the court that the respondent have since applied for case management and will be praying for an early trial of the action.

[27] We found nothing erroneous with the decision of the learned judge in granting the order prayed for by the respondent in this application. Order 29 r 2 of the rules provides for a pre-trial remedy available to a party before the full trial of an action, viz, the preservation of the subject-matter of the dispute. In these proceedings, the balance of the proceeds of sale of the said property is the subject-matter. The said property has been sold to a third party by way of auction after the foreclosure proceedings. Public Bank Bhd would be legally bound to pay the balance of the proceeds of sale to the appellant, it being the registered owner of the said property at the material time. It is the contention of the respondent, in pursuing its counterclaim, that it is entitled to damages in the sum of RM1.28 million and that if the balance of the proceeds of sale is paid to the appellant the monies will be utilised by the appellant and it will be left with no remedy.

[28] As discussed earlier, the appellant instituted these proceedings on the premise that the said power of attorney is null and void and has sought a declaration to that effect. It has also sought for a declaration that the said agreement is null and void and has prayed for an order that the said agreement be rescinded. Thus, the main issue which would need to be determined at the trial is the validity of the said power of attorney.

[29] The facts showed that TCK was armed with the said power of attorney when he entered into the said agreement. According to Osborn's Concise Law Dictionary (8th edition) a power of attorney is:

> A deed by which one person empowers another to represent him, or act in his stead either generally or for specified purposes. The donor of the power is called the principal or constituent; the donee is called the attorney.

[30] In relation to the same, Judith E Sihombing in her book entitled *The National Land Code — A Commentary*, described a power of attorney as follows:

> where one person (the donor of the power) formally authorise another (the donee of the power) to act as his agent; the donor effect an instrument (the power of attorney) to appoint the donee his attorney under power.

[31] As to the effect of such an instrument, she said:

> The result of appointing the donee is to enable the donee to act for the donor generally or in a specified transaction or series of transaction.

[32] Section 3 of the Powers of Attorney Act 1949 ('the Act'), *inter alia*, reads:

> (1) No instrument purporting to create a power of attorney executed after the commencement of this Act shall have any validity to create such power within West Malaysia unless
>
> (a) if executed within West Malaysia, the instrument is executed before, and is authenticated in the appropriate form set out in the First Schedule hereto by:
>
> (vi) an advocate and solicitor;

[33] Section 4 of the Act, *inter alia*, reads:

> (1) Except as hereinafter provided no instrument purporting to create a power of attorney shall, after the commencement of this Act, have any validity to create such power within West Malaysia until:
>
> (a) a true copy of the said instrument duly compared therewith and marked by the senior assistant registrar with the words 'true copy'; or
>
> (b) ...
>
> has been deposited in the office of a senior assistant registrar.

[34] Section 6 of the Act reads:

> (1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser:
>
> (a) the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power; and
>
> (b) any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and
>
> (c) neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power.
>
> (2) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

[35] Section 7 of the Act reads:

> If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, then, in favour of a purchaser:

(a) the power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power; and

(b) any act done within that fixed time, by the donee of the power, in pursuance of the power shall be valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(c) neither the donee of the power, nor the purchaser, shall at anytime be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.

[36] In *Caltex Oil Malaysia Ltd v Tee Than Song* [1969] 2 MLJ 184 Raja Azlan Shah J (as His Royal Highness then was) said (at p 185):

> It is established law that a court upon an application for an interlocutory injunction in support of a legal right will deal with the injunction upon the affidavits and documents verified thereby and will confine itself directly with the immediate object sought, in order to leave the ultimate question between the parties to be decided on evidence adduced at the trial.

[37] In *Lian Keow Sdn Bhd v Overseas Credit Finance Bhd* [1982] 2 MLJ 162 Salleh Abas FJ (as His Lordship then was) said (at p 163):

> An interlocutory injunction is a temporary and discretionary remedy. To consider whether to grant it or to refuse it the court is not concerned with the chances of success or failure of the appellants in proving their civil suit at the forthcoming trial, neither is the court's function to evaluate the evidence and materials before it for that purpose. The court is simply concerned with what it has to do in the meantime in order to protect the rights of the parties so that no irreparable injury would be caused to either of them. Further whilst the court is not concerned with such questions the court must however, be satisfied that there are serious questions to be gone into that suit, lest an application for an injunction should be made on frivolous and vexatious grounds (*American Cynamid v Eithicon Ltd*).

[38] We are of the view that the above principles would equally apply to applications for the preservation of property which is the subject-matter of the cause or matter made pursuant to O 29 r 2 of the rules. Just as an application for injunction, an application for the preservation of property is a pre-trial remedy.

[39] Are there serious questions to be tried in these proceedings? Looking at the said power of attorney, we do not think it can be seriously disputed that it was not executed before an advocate and solicitor in accordance with s 3 of the Act. It is also not disputed that a true copy of the said power of attorney

was deposited in the office of the senior assistant registrar, High Court at Penang pursuant to s 4 of the Act. The material before us including the proviso appearing towards the end of the said power of attorney seems to suggest that the said power of attorney was given for valuable consideration. According to *Halsbury's Laws of England* (9th Ed) (at p 184):

> Valuable consideration has been defined as some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other at his request. It is not necessary that the promisor should benefit by the consideration. It is sufficient if the promisee does some act from which a third person benefits, and which he would not have done but for the promise.

[40] The facts before us showed the following:

(i) the said power of attorney is dated 3 June 1996;

(ii) the said agreement was executed on 31 December 2001;

(iii) the said power of attorney was purportedly revoked on 30 January 2002, ie, after the execution of the said agreement;

(iv) the appellant filed the writ action on 9 April 2002.

[41] Thus, one of the questions which has to be decided at the trial is whether the said power of attorney was given for valuable consideration. Another question which has to be decided at the trial is whether the purported revocation of the said power of attorney was in accordance with the provisions of the Act. The said agreement was executed before the purported revocation and this would be clearly be an issue which will be litigated between the parties. The proviso appearing in the last paragraph of the said power of attorney states that the appellant shall not revoke the same until such time the loan of RM2.5 million granted by Public Bank Bhd to Mega Splendour Sdn Bhd shall have been fully settled by the appellant, ie the donor. The issue as to whether the concurrence of TCK as donee is required before the said power of attorney can be revoked, pursuant to ss 6 or 7 of the Act, is another question which would need to be litigated between the parties. If it is decided at the trial that the said power of attorney is valid and that the respondent is a bona fide purchaser for value, a question which would then arise is whether it is entitled to the damages prayed for; the respondent would not now be in a position to claim for specific performance as the said property has been sold pursuant to the order for sale.

[42] We are of the view that the above are serious questions between the parties which need to be decided on evidence adduced at the trial.

[43] One of the grounds that the respondent pursued in canvassing this application is that it is perturbed that if the court decides that it is entitled to damages, it may face a problem in recovering damages from the appellant. In relation to this, we noted that the profit and loss account of the appellant shows, for financial year ended 30 June 2002, its paid up capital is RM484,534 and the value of its current assets was RM25.354,697 whilst its current liabilities

amounted to RM30,507,713. We are not in a position to say whether the appellant was insolvent at the material time but these figures would naturally be a cause for concern from the point of view of the respondent. Upon execution of the said agreement, the respondent paid a sum of RM 172,000 which was 10% of the purchase price of the said property. In relation to the manner and time of payment of the balance purchase price, s 2 of the second schedule to the said agreement reads:

> Ringgit Malaysia One Million Five Hundred and Forty-Eight Thousand (RM 1,548,000) only shall be paid by the Purchaser to the Vendor within four (4) months from the date of execution hereof (herein referred to as 'the completion period'). The purchaser shall be entitled to an extension of one (1) month (hereinafter referred to as 'the extended completion date') to complete the purchase, whereupon interest on the balance purchase price shall be payable to the vendor at the rate of eight per centum (8%) per annum for the period of extension or part thereof calculated on a daily basis.

[44] From our reading, the respondent would need to pay the balance purchase price by 30 April 2002. It is also entitled to an extension of one month if the need arises subject to payment of interest at 8% per annum.

[45] The appellant purportedly revoked the said power of attorney on 30 January 2002 and subsequently filed this writ action on 9 April 2002, viz, before the payment of the balance purchase price was due. The respondent has shown that on 25 February 2002, it had successfully applied for a loan of RM1.1 million from Standard Chartered Bank to pay the balance purchase price. From these facts, we find no merit in the argument canvassed by the appellant that the respondent did not pay the balance of the purchase price within the time-frame as per the said agreement when the appellant through its solicitors had, by letter dated 1 April 2002, informed solicitors for the respondent that their client is not to make any further payments to TCK as it considered the said agreement to be null and void. That letter reads:

> Re: POWER OF ATTORNEY DATE 3 JUNE 1996 ALLEGEDLY GRANTED BY TAN CHONG KEAT SDN BHD TO TAN CHONG KEAN
>
> We are instructed to inform you that our client considers the Sale and Purchase Agreement dated 31 December 2001 with Pintar Pintas Sdn Bhd as null and void. In the circumstances your client is not to make any further payments to the Vendor.
>
> We are further instructed to inquire from you whether your client is prepared to consider the agreement as duly aborted, failing which our instructions are to file legal proceedings in court within the next few days.

[46] We also cannot find any merit in the arguments raised by the appellant before us in relation to cl 5(d) of the said agreement, viz, that the clause comprehensively sets out the specific remedy available to the respondent in the event of any default on the part of the vendor. From our reading, the said cl 5(d) has no bearing upon this application. We are also of the view that the

appellant's contention that the respondent took no steps to tender payment of the redemption sum to Public Bank Bhd cannot hold water. The facts showed the appellant had instituted these proceedings before the completion date under the said agreement. There is no basis for the appellant to contend that had the respondent made payment to Public Bank Bhd, the bank would have no cause to exercise its right to foreclose on the said property.

[47] We are of the view that there exist several serious questions to be tried as discussed above and the learned judge was correct in making the order that he did. Further, the conduct of the appellant seems to support the respondent's stand that there is a real risk that the appellant may dissipate or remove the balance of the proceeds of sale of the said property due from Public Bank Bhd. Under the circumstances, the balance of convenience clearly lies in favour of granting the order for the preservation of the balance of the proceeds of sale of the said property, viz, by paying the monies into a joint bank account of solicitors for the appellant and respondent pending the disposal of the proceedings. We cannot see how the appellant can be prejudiced by such an order. In our view no injustice would be suffered by the appellant by the granting of the order.

[48] For the above-said reasons we had on 14 December 2004 dismissed the appeal with costs and made directions for an early trial of the suit.

Appeal dismissed with costs.

Reported by Peter Ling